

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 9, 2009 Session

ROSIA MARIE ANDERSON v. HOZELL ANDERSON

Appeal from the Circuit Court for Davidson County
No. 06D-2416 Muriel Robinson, Judge

No. M2009-00337-COA-R3-CV - Filed November 3, 2009

The husband appeals the trial court's finding that by transmutation separate property became marital property after the property was refinanced and improved by loan proceeds via a note and mortgage that wife co-signed and after wife helped make loan payments during the 16 year marriage. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed
Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Grayson Smith Cannon, Goodlettsville, Tennessee, for the appellant, Hozell Anderson.

James W. Price, Jr., Nashville, Tennessee, for the appellee, Rosia Marie Anderson.

OPINION

The sole issue on appeal raised in this divorce proceeding is whether certain tracts of real property titled to Husband became marital property subject to division under Tenn. Code Ann. § 36-4-121(b)(1).

Rosia Marie Anderson filed for divorce from her husband, Hazell Anderson, in August of 2006. The Final Decree granting the divorce was entered on January 22, 2009. In that decree, the trial court found that real property lots acquired by Mr. Anderson both before and during the marriage had become "marital property by transmutation as a result of the actions of the parties in purchasing the properties, encumbering them by mortgage and otherwise using the property as if it was jointly owned marital property." The trial court found that Mr. Anderson had sold this property in violation of the trial court's prior orders for a net amount of \$478,000. Consequently, the trial court awarded Ms. Anderson one-half of the equity in the property as determined by the sales price,

\$235,000.¹ Mr. Anderson first appeals the trial court’s finding that the entire property at issue was marital property and argues that a portion of the property was owned by him before the marriage and is his separate property. Second, Mr. Anderson argues that Ms. Anderson failed to provide evidence about the value of the portion of the property that was correctly designated as marital so that there is no basis to make an award to her.

I. TRANSMUTATION OF SEPARATE PROPERTY INTO MARITAL PROPERTY

The statutes governing divorce, Tenn. Code Ann. § 36-4-101 *et seq.*, direct the courts to divide the marital property equitably “without regard to marital fault in proportions as the court deems just.” Tenn. Code Ann. § 36-4-121. Marital property includes all types of property acquired in the course of the marriage. Tenn. Code Ann. § 36-4-121(b)(1)(A). However, a spouse’s separate property is not subject to division by statute. *Barnhill v. Barnhill*, 826 S.W.2d 443, 451 (Tenn. Ct. App. 1991). A spouse’s separate property includes “[a]ll real and personal property owned by a spouse before marriage.” Tenn. Code Ann. § 36-4-121(b)(2)(A).

The courts of Tennessee have recognized two possible methods whereby property that is separately owned can be converted into marital property for the purpose of equitable division in divorce cases. The method relevant herein is transmutation, which takes place when the parties treat separate property in such a way as to reflect an intention that it become marital property. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002). Transmutation may occur, for example, when the separate property of one spouse is used to purchase other property, which is then placed in the name of both spouses. *Barnhill v. Barnhill*, 826 S.W.2d at 451. However, “[i]n the final analysis, the status of property depends not on the state of its record title, but on the conduct of the parties.” *Cohen v. Cohen*, 937 S.W.2d 823, 832 n. 12 (Tenn. 1996) (quoting *Mondelli v. Howard*, 780 S.W.2d 759, 774 (Tenn. Ct. App. 1989)). Whether title has been conveyed to the non-owner spouse is not determinative of whether the property is marital. *Cohen*, 937 S.W.2d at 832 n. 12.

II. ANALYSIS

The following facts are not disputed. Husband owned 1206 Brick Church Pike at the time the parties married in 1990. Shortly after the parties married, Husband bought four lots on Fern Street which were apparently close to the Brick Church Pike lot. All of these lots were titled to Husband. To purchase the Fern Street lots for \$35,000 and to construct buildings on the 1206 Brick Church Pike lot, Husband borrowed \$125,000 secured by a deed of trust on the Fern Street lots. Wife was a party to the promissory note, and she executed the deed of trust securing the loan. Husband operated his transmission repair business from this property.

Husband acknowledges on appeal that the Fern Street lots were marital property. According to Husband, however, the trial court erred in finding the Brick Church Pike lot to be marital property

¹ The amount was offset by amounts the trial court awarded Mr. Anderson which are not subject to this appeal.

and in awarding half its value to Wife. Furthermore, Husband argues, since the only evidence of value for the Fern Street lots was the sales price for the Fern Street lots combined with the Brick Church Pike lot, and since the trial court erred in finding the Brick Church Pike lot to be separate property, then there is no evidence of value for the Fern Street lots separately to support an award to Wife of one-half of the value of the Fern Street properties. Consequently, Husband argues, the trial court erred in awarding Wife half of the value of the Fern Street lots that were admittedly marital property since Wife failed to prove the value of the Fern Street lots. The effect of Mr. Anderson's two arguments is that Ms. Anderson should not have been awarded any amount for half her equity in these properties.

The Brick Church Pike property was the Husband's separate property since it was acquired before the marriage. In order to prove that it was transmuted to marital property the burden of proof before the trial court was on Ms. Anderson to show that it was the intent of the parties that the separate property be treated as marital property. *Keyt v. Keyt*, 244 S.W.3d 321, 328 (Tenn. 2007).

The trial court found that the Brick Church Pike property became marital property by transmutation. The evidence shows that beginning in 1990 Wife obligated herself on a promissory note for which a part of the proceeds were used to improve the Brick Church Pike property. Husband also appeared to testify that these loan proceeds were used to refinance the existing mortgage on the Brick Church Pike property, and the trial court so found in its ruling from the bench. Husband acknowledges that Wife made some of the payments on the note but stated that he reimbursed her for these amounts. Although Husband disputes Wife's testimony on this point, Wife testified that on occasion when Husband's business was slow, she made the mortgage payments from her own funds without reimbursement. Both parties agree that when the \$20,000 balance on the loan became due, \$10,000 was paid from the parties' joint savings account and \$10,000 with Wife's credit card. Husband repaid Wife the \$10,000 paid by her credit card, but made no reimbursement of the amount taken from their joint savings account.

Whether an asset is separate property or marital property is a question of fact. *Cutsinger v. Cutsinger*, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995). The trial court's findings of fact are reviewed *de novo* with a presumption of corrections unless the evidence preponderates otherwise. *In re Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); Tenn. R. App. P. 13(d). Based on the fact that Ms. Anderson signed the note which allowed Mr. Anderson to refinance and improve the Brick Church Pike property and helped him make the payments, we cannot find that the evidence preponderates against a finding that the brick Church Pike property became marital property by transmutation.²

²Since the Brick Church Pike lot is marital property, there is no problem with wife's proof of the total value of the marital property consisting of the Fern Street lots and the Brick Church Pike property.

The trial court is affirmed. Costs of this appeal are assessed against the appellant, Hozell Anderson, for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.